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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1828

UNION PACIFIC RAILROAD CO., AND SYSTEM FEDERATION NO. 105, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO,
Petitioners,

v.

DENNIS COHN, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

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No.

UNION PACIFIC RAILROAD CO., AND SYSTEM FEDERATION NO. 105, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO,
Petitioners,

v.

DENNIS COHN, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Union Pacific Railroad Co. and System Federation No. 105, Railway Employes' Department, AFL-CIO, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in favor of the respondents[1] in the above-entitled case on March 27, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A, is reported at 572 F.2d 650. The opinion of the District Court, relied upon by the Court of Appeals as the

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[1] Respondents, plaintiffs below, are: Dennis Cohn, Daniel J. Mathers, Ralph E. Gosnell, Harry F. Miles, and Thomas P. Meduna.

basis for its judgment, is reported at 427 F. Supp. 717, and is printed, together with separate judgments entered in accordance therewith, in Appendix B.

JURISDICTION

The opinion of the Court of Appeals was filed, and judgment in accordance therewith, printed in Appendix C, entered, on March 27, 1978. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Must a reemployed veteran, whose completion of an on the job training period was interrupted by military service, complete his training before being given journeyman status and seniority, when the applicable collective bargaining agreement has at all times required completion of an apprenticeship, or a specified period of actual working experience on the job, as a prerequisite for qualification as a journeyman, and that requirement has been uniformly imposed in practice?

2. May a court substitute its judgment for that of the parties to a collective bargaining agreement, determine that the training program prescribed by the agreement is not calculated to promote skill and proficiency, and accord immediate journeyman's status and seniority to reemployed veterans irrespective of the amount of training they had received?

STATUTES INVOLVED

This case involves questions as to the proper interpretation and application of the reemployment provisions of the Vietnam Era Veterans Readjustment Assistance Act of 1974, 38 U.S.C., Sec. 2021 *et seq.* (hereinafter referred

to as "the Act").[2] The provisions pertinent to this case, contained in Sections 2021(a), 2021(b)(1), and 2021(b)(2), are as follows:

> "(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
>
> • • •
>
> "(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—
>
> > "(i) if still qualified to perform duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; • • •
>
> "unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. Nothing in this chapter shall excuse noncompliance with any statute or ordinance of a State or political subdivision thereof establishing greater or additional rights or protections than the rights and protections established pursuant to this chapter.

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[2] The veterans's reemployment rights provisions were formerly found in Section 9 of the Military Selective Service Act (50 U.S.C. App. Sec. 459). Pursuant to P.L. 93-508 (December 3, 1974), these provisions were recodified as 38 U.S.C. Sec. 2021, *et seq.*

"(b) (1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

"(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in his employment as he would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment."

STATEMENT OF THE CASE

These actions, consolidated below, were brought by five returned veterans, respondents here, who were reemployed by petitioner Union Pacific Railroad Co. (Union Pacific) upon completion of their military service pursuant to the federal statutes here involved, and jurisdiction in the District Court was based on Title 38, United States Code, Section 2022 (1974). Respondents, as employees in job categories within the craft or class of railway carmen, were represented for purposes of collective bargaining under the Railway Labor Act (45 U.S.C., Sec. 151, *et seq.*)

by the Brotherhood Railway Carmen of the United States and Canada. The rates of pay, rules and working conditions governing their employment, including seniority rights, were fixed by an agreement negotiated on a federated basis by the Brotherhood and other shopcraft labor organizations operating through petitioner System Federation No. 105, Railway Employes' Department, AFL-CIO (System Federation), which intervened as a defendant in the District Court. (App. 6a-7a).

At the time of entering military service each of the respondents was employed in a position known as "Rule 154 Carman", having been hired outright or advanced from the category of carman helper under a rule of the applicable collective bargaining agreement permitting the Union Pacific to assign non-qualified employees to perform journeyman carman's work on a temporary basis in the event of a shortage of qualified journeymen.[3] Briefly stated, under the agreement the qualifications for the position of regular or journeyman carman consist either of the completion of a four year apprenticeship or the accumulation of 1040 days' experience at carman's work. The agreement further provides that except for the Rule 154 carmen, none but journeymen carmen or their apprentices may perform carman's work, and that Rule 154 carmen will not be retained in service when four-year carmen become available. (App. 6a).

At the time of entering military service respondents had completed only a portion of the requisite 1040 days' working experience. Cohn had completed only 181 days, Mathers 75 days, Gosnell 203 days, Miles 95 days, and Meduna 358 days. After their discharge from the military respondents were reemployed as Rule 154 carmen and resumed the performance of work required to attain

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[3] A Rule 154 Carman is the equivalent of an "upgraded carman" in *Tilton* v. *Missouri Pacific R. Co.*, 376 U.S. 169 (1964).

journeyman status. Under the agreement Rule 154 carmen have seniority rights only as between themselves, and can only achieve seniority as journeymen dating from the time they first performed service on a regular or permanent assignment to a journeyman's position after qualifying by completing the 1040 days of working experience. However, in the case of Rule 154 carmen whose employment was interrupted by military service, Union Pacific and the System Federation provided by agreements that upon completion of the 1040 day period, they would be granted retroactive seniority dates as journeymen carmen reflecting credit for the work days missed because of military service.[4] (App. 6a-7a).

Following their return from military service and reemployment, but before they had completed their respective 1040 day periods, respondents were laid off because of lack of work. They each brought suit to recover wages lost during the layoff, claiming that the time they spent in the military should have been credited toward the completion of their 1040 day periods, and that had this been done they would have been protected against the layoff by journeyman status and seniority. (App. 7a).

At no time has Rule 154 been interpreted or applied as reducing or setting aside the qualification requirements imposed by the agreement as a condition of regular or permanent classification as a carman mechanic (i.e., qualified carman, journeyman). Until they have actually worked 1040 days, doing carmen's work, Rule 154 carmen do not acquire, by contract or custom and practice, a right to establish seniority as carman mechanics or journeymen. No Union Pacific employee has ever been accorded permanent classification and seniority status as a carman mechanic or journeyman before he completed an

[4] These agreements also allowed credit towards completion of the 1040 days for the performance of work similar to carmen's work while in military service.

apprenticeship or accumulated 1040 days of actual working experience performing carman's work. Moreover, no employee received credit toward the completion of the 1040 day requirement for any day on which he was on furlough or layoff status, or absent from work for sickness, disability or other reason. (App. 12a, 13a).

The facts were undisputed, the case being submitted to the District Court upon a stipulation of facts with exhibits and one affidavit, and on February 8, 1977, that court, by a Memorandum (App. 3a-17a) filed February 11, 1977, with accompanying orders, entered judgment in favor of the plaintiffs, respondents here. The District Court did not question the fact, as stipulated by the parties, that the applicable collective bargaining agreements and uniform custom and practice required 1040 days of actual work experience, rather than the mere passage of calendar time in the employ of the railroad, as a condition for qualification of an employee for classification as a regular or journeyman carman. The court, however, concluded that such a requirement, though provided for in the contract, was in its opinion not necessary for the achievement of sufficient proficiency to perform carman's work. It therefore ruled that respondents should have been accorded journeyman status and seniority immediately upon their return from military service, without regard to the amount of working experience they had accumulated as Rule 154 carmen before entering the military. The Court of Appeals affirmed on the basis of the District Court's opinion. (App. 1a-2a).

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with applicable decisions of this Court.

In holding that military service must be accepted as a substitute for work training required by collective bargaining agreements as a prerequisite to journeyman

status, the decisions below are in clear conflict with previous decisions of this Court. Of these the most directly controlling is *Tilton* v. *Missouri Pacific R. Co.*, 376 U.S. 169 (1964), which supplied the pattern for the treatment of respondents which the courts below have now held to be improper.

That case involved substantially the same contract provisions as applied to a category of employees called "upgraded carmen" (conceded below by counsel for respondents to be the equivalent of Rule 154 carmen here), whose completion of the work experience necessary to become journeymen was interrupted by military service. In *Tilton*, this Court, interpreting comparable provisions of predecessor statutes dealing with veterans' reemployment rights, declared that a veteran is not automatically entitled to a promotion which is based upon satisfactory completion of a training period simply because he served in the military. Thus the Court stated:

". . . that Congress intended a reemployed veteran, who, upon returning from military service, *satisfactorily completes his interrupted training*, to enjoy the seniority status which he would have acquired by virtue of continued employment but for his absence in military service. This requirement is met if, as a matter of foresight, it was reasonably certain that advancement would have occurred, *and if, as a matter of hindsight, it did in fact occur.*

This does not mean that under §§ 9(c)(2) the veteran, upon returning from service, must be considered for promotion or seniority purposes as if he had continued to work on the job. A returning veteran cannot claim a promotion that depends solely upon satisfactory completion of a prerequisite period of employment training unless he first works that period. But upon satisfactorily completing that period, as petitioners did here, he can insist upon a seniority date reflecting the delay caused by military service.

Any lesser protection would deny him the benefit of the salutary provisions of §§ 9(c)(1) and 9(c)(2) of the Universal Military Training and Service Act." [Emphasis added]. 376 U.S. at 181.

In this case the courts below held that military service relieved respondents from a work training requirement applicable to all other employees of Union Pacific. But it is well-established by previous decisions of this Court that the Act does not confer upon reemployed veterans any such special privilege, super-seniority, or immunity from the normal operation of contractual seniority systems. Thus in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946), in holding that a veteran was properly reinstated to his former position even though, because of his contractual seniority, he was placed on layoff status instead of active employment, the Court pointed out that the seniority to which the veteran is entitled is only that which flows from the applicable collective bargaining agreement. The Court said:

"Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congres sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework of the seniority system . . ." 328 U.S. at 288.

To similar effect is the decision in *Aeronautical Industrial Dist. Lodge 272* v. *Campbell*, 337 U.S. 521 (1949), where the Court held that the veteran's seniority rights were subject to the same conditions of the collective bargaining agreement as those of his fellow employees, and refused to immunize him from the effect of reasonable changes in the agreement, even though occurring during his absence in military service. In so holding, the Court said:

"In providing that a veteran shall be restored to the position he had before he entered the military service 'without loss of seniority,' § 8 of the Act uses the term 'seniority' without definition. It is thus apparent that Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining. We must therefore look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran.

"Barring legislation not here involved, seniority rights derive their scope and significance from union contracts, confined as they almost exclusively are to unionized industry. See Trailmobile Co. v. Whirls, 331 U.S. 40, 53, note 21, 91 L. Ed. 1328, 1337, 67 S. Ct. 982. There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. *Thus, probationary conditions must often be met before seniority begins to operate; sometimes it becomes retroactive to the date of employment; in other instances it is effective only as from the qualifying date;* in some industries it is determined on a company basis, in others the occupation or the plant is taken as the unit for seniority determination; sometimes special provisions are made for workers in key positions; and then again these factors are found in varying combinations. See Williamson & Harris, Trends in Collective Bargaining 100-102 (1945); Harbison, Seniority Policies & Procedures as Developed through Collective Bargaining 1-10 (1941).

"To draw from the Selective Service Act an implication that date of employment is the inflexible basis

for determining seniority rights as reflected in layoffs is to ignore a vast body of long-established controlling practices in the process of collective bargaining of which the seniority system to which that Act refers is a part. . . ." 337 U.S. at 526-527. (Emphasis added.)

The decisions below, in relieving respondents from the obligation to complete the work training required of other employees as a prerequisite to journeyman status, completely ignore the hindsight aspect of the "foresight-hindsight" test enunciated by this Court in the *Tilton* opinion, and directly conflict with the express statement in that case that the veteran cannot claim a promoted position unless he first works the required period of employment training. They conflict with the *Fishgold* decision by according respondents preferences not enjoyed by fellow employees and granting them immunity from the normal qualification requirements for the position of journeyman. And in setting aside the requirements of the collective bargaining agreement, and substituting the District Court's opinion for that of the contracting parties with respect to the necessity of work experience for achieving proficiency as a journeyman, they are completely at odds with the principles laid down in the *Campbell* case.

This Court's recent decision in the case of *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977), cited by the Court of Appeals below, does not support the decisions below. That case did not involve any question of crediting military service as a substitute for working experience required as a condition of qualifying for a higher level position, and in fact the Court there reaffirmed the principles of the *Tilton* decision, and its foresight-hindsight doctrine, saying:

". . . Tilton's satisfactory completion of the probationary period after he was reinstated by the railroad was sufficient indication that he would have

completed that period earlier if his tenure had not been interrupted by his service to his country . . . ." 431 U.S. at 586.

The Court's conclusion that the pension benefits involved in the *Alabama Power* case were a reward for length of service which accrued with the passage of years in the same company's employ, rather than by virtue of the actual service rendered, obviously is no authority for the proposition that journeyman status here was an attribute of respondents' seniority in a lower level position, when it was stipulated that achievement of journeyman status was uniformly subject to the requirement of 1040 days' actual working experience as Rule 154 carman.

2. **This case involves questions as to the impact of veterans' statutory reemployment rights upon collectively bargained apprenticeship and job training programs in all industries as well as the railroads, which the courts below have decided in such a way as to constitute a precedent for the lowering or elimination of accepted standards of training and qualifications of journeymen in all trades.**

Implicit in the decisions below is the conclusion that Rule 154 carmen, by virtue of the fact that they perform work within the same classification of work performed by carman mechanics, are qualified to be considered carman mechanics (journeymen) from the outset. What this amounts to is a judicial determination that progression requirements in the contract are unfair because employees with 1040 days actual working experience are no more proficient, or better qualified carmen, than beginners on the job. The District Court apparently would dispense with the requirement were it running the railroad. Put another way, the courts below have concluded that an individual who is hired by the railroad and works one day as a Rule 154 carman can enlist in the military, request reemployment and, upon his return, properly demand that he be accorded journeyman status, all this despite the fact that he possesses virtually no on-the-job experience doing carman's work.

In holding that the veterans would not be required to satisfy the 1040 day requirement in the contract for advancement to regular or journeyman carman status, the District Court totally disregarded the judgment of the parties to the contract. The record is clear that they have adopted a general standard by which all employees seeking to attain journeyman carman status are judged, and have determined that the completion of an apprenticeship or the performance of carman's work for 1040 days renders an individual sufficiently proficient at carman's work to be considered a journeyman. Moreover, this standard has been, and continues to be, rigidly enforced. At no time since at least September 1, 1949, has any person been regarded as a qualified carman (mechanic), and been accorded seniority rights as such, unless and until he "has served an apprenticeship or . . . has had four years' practical experience at carman's work".

In essence, the courts below have substituted their opinion for that of the parties to the agreement and decided how the Union Pacific should measure the proficiency of its employees in order to determine when seniority rights should be granted. This intrusion into the areas of collective bargaining and management discretion is not what Congress intended in promulgating the Act and is unwarranted. See *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521 (1949).[5]

It is clear that the decisions below, if allowed to stand, would require the placement of reemployed veterans in skilled job classifications superior to those which they held at the time of entering military service, for which

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[5] Certainly, if the record revealed some evidence that the railroad was intentionally trying to subvert the goals and purposes of the Act, or that the 1040 day work requirement was merely "a skillful device of hostility to veterans" (*Aeronautical Industrial District Lodge 727* v. *Campbell, supra*, 337 U.S. at 529), then the decisions below might be justified. However, no such evidence has been presented here.

they possessed substandard qualifications, and would accord them superseniority over non-veteran fellow employees who are required to meet standard qualification requirements before achieving status and seniority in skilled or journeyman classifications. The inevitable result would be the lowering of morale of the employee group as a whole, and probable relaxing of qualification requirements with a concomitant reduction in skill and proficiency of the employer's labor force.

We believe, however, that the decisions of this Court discussed above clearly establish that in enacting the statutes granting reemployment rights to veterans, Congress did not intend any such result, nor any transfer to the arena of federal court litigation of the function of determining what apprenticeship or on the job training programs were necessary or desirable to establish an employee's right to advance to a higher, more skilled job classification.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 77-1227, 77-1228, 77-1229,
77-1230, 77-1231, 77-1264,
77-1265, 77-1266, 77-1267,
and 77-1268

DENNIS COHN, DANIEL J. MATHERS, RALPH E. GOSNELL,
HARRY F. MILES, THOMAS P. MEDUNA,
Appellees,

v.

UNION PACIFIC RAILROAD CO.,
Appellant,

and

SYSTEM FEDERATION NO. 105,
RAILWAY EMPLOYEES' DEPARTMENT, AFL-CIO,
Intervenor-Appellant.

Submitted: November 15, 1977

Filed: March 27, 1978

Before BRIGHT and ROSS, Circuit Judges, and HARPER, Senior District Judges.*

HARPER, Senior District Judge

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* The Honorable Roy W. Harper, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

This is a timely appeal by defendant and intervenor from final judgment on these consolidated cases wherein the District Court entered judgment for the plaintiffs under the Vietnam Era Readjustment Assistance Act of 1974, 38 U.S.C. § 2021 *et seq.*

The facts, the issues and the basis of the decision are fully stated in Judge Denney's well-reasoned opinion in *Cohn* v. *Union Pacific Railroad Company*, 427 F.Supp. 717 (D. Neb. 1977).

Our examination of records and briefs satisfies us that the trial court's decision is supported by substantial evidence and is not induced by any erroneous view of the law. In addition to the cases relied on by the District Judge to support his opinion, the case of *Alabama Power Company* v. *Davis*, 431 U.S. 581, 97 S.Ct. 2002 (1977), supports the judgment of the District Court.

We affirm on the basis of the trial court's reported opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

[Feb. 11, 1977]

Civil No. 75-0-247

MEMORANDUM

DENNIS COHN,
Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,
Defendant,

and

SYSTEM FEDERATION No. 105,
RAILWAY EMPLOYEES' DEPT., AFL-CIO,
Intervenor.

Civil No. 75-0-248

MEMORANDUM

DANIEL J. MATHERS,
Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,
Defendant,

and

SYSTEM FEDERATION No. 105,
RAILWAY EMPLOYEES' DEPT., AFL-CIO,
Intervenor.

Civil No. 75-0-249

MEMORANDUM

RALPH E. GOSNELL,
Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,
Defendant,

and

SYSTEM FEDERATION No. 105,
RAILWAY EMPLOYEES' DEPT., AFL-CIO,
Intervenor.

Civil No. 75-0-250

MEMORANDUM

HARRY F. MILES,
Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,
Defendant,

and

SYSTEM FEDERATION No. 105,
RAILWAY EMPLOYEES' DEPT., AFL-CIO,
Intervenor.

Civil No. 75-0-251

MEMORANDUM

THOMAS P. MEDUNA,
Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,
Defendant,

and

SYSTEM FEDERATION No. 105,
RAILWAY EMPLOYEES' DEPT., AFL-CIO,
Intervenor.

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DENNEY, District Judge

These consolidated cases are before the Court for decision on the merits upon the parties' stipulation of facts. In accordance with Rule 52(a), Fed.R.Civ.P., the Court makes the following findings of facts and conclusions of law.

The United States Attorney for the District of Nebraska instituted these actions under the Vietnam Era Veterans' Readjustment Assistant Act of 1974, 38 U.S.C. § 2021 et seq., on behalf of plaintiffs, Dennis Cohn, Daniel Mathers, Ralph Gosnell, Harry Miles and Thomas Meduna.[1] Jurisdiction is invoked pursuant to 38 U.S.C.

[1] 38 U.S.C. § 2022 authorizes the United States Attorney to act as attorney for plaintiffs.

§ 2022. The issue presented is whether plaintiffs, upon their return from military service and reinstatement to employment as Rule 154 carmen, are entitled to have their time spent in the services credited toward the four years of work experience required by the collective bargaining agreement before Rule 154 carmen can obtain regular carmen status and seniority with additional layoff protection and benefits.

I.

Plaintiffs were employed by Union Pacific Railroad as Rule 154 Carmen prior to their military service. Rule 133 of the applicable collective bargaining agreement provides for the qualifications of carmen:

> Any man who has served an apprenticeship or has had four years' practical experience at carmen's work, and who with the aid of tools, with or without drawings, can lay out, build or perform the work of his craft or occupation in a mechanical manner, shall constitute a carman.

Rule 154 provides as follows:

> In the event of not being able to employ carmen with four years' experience, regular and helper apprentices will be advanced to carmen in accordance with their seniority. If more men are needed helpers will be promoted. If this does not provide sufficient men to to do the work, men who have had experience in the use of tools may be employed. They will not be retained in service when four-year carmen become available.

Rule 154 carmen do not acquire a right to establish seniority in the carmen's group until they have accumulated 1040 days experience at carmen's work as Rule 154 carmen, but acquire seniority only among the active group of Rule 154 carmen. The parties have stipulated

that seniority as a carman dates from the time an employee first performed service on a regular, permanent assignment to a position as a carman, which position may only be acquired when he first becomes qualified under Rule 133 for regular or permanent assignment to a position as carman. Defendant and intervenor have, however, by agreements dated December 3, 1955, and June 6, 1956, provided retroactive seniority status for Rule 154 carmen whose employment was interrupted by military service for the United States. These agreements provide that, upon completion of the 1040 day period, a Rule 154 carman whose 1040 day period is interrupted by military service will be granted a seniority date as a journeyman carman adjusted to extend him credit retroactively for those work days he missed as a result of his military service and also provide that, if a Rule 154 carman performs work similar to carman's work while in military service, the time spent in the performance of such work will be credited towards the completion of that employee's 1040 day period.

Plaintiffs had accumulated a certain number of 1040 days' experience at carmen's work prior to entering the military. Upon timely application for reemployment after discharge from the Armed Forces, plaintiffs were reemployed by Union Pacific Railroad and, in accordance with the 1040 days work requirement, they resumed progress towards the attainment of the 1040 days necessary to obtain journeyman status and the concomitant establishment of a seniority date.

On December 17, 1974, plaintiffs were laid off because of lack of work. The parties have stipulated that if the time plaintiffs had spent in the military had instead been spent in the performance of work as Rule 154 carmen in defendant railroad's employ without material interruption on account of sickness, furlough or leave of absence, plaintiffs would not have been laid off on December 17,

1974, because they would have completed the 1040 day requirement and achieved journeyman status sooner than journeyman carmen who were not laid off.

II.

At issue in these cases is the right of each plaintiff under the Vietnam Era Veteran's Readjustment Assistance Act of 1974 to have his seniority date in the skilled trade classification established "in such manner as to give such person such status in his employment as he would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment or reemployment." [2]

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[2] 38 U.S.C. § 2021 (formerly 50 U.S.C. App. § 459) provides in relevant part as follows:

> (a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
>
> . . . .
>
> (B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—
>
> (i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay;
>
> . . . .
>
> (b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such

> person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

38 U.S.C. § 2021(b)(2). This provision expressly incorporates the principle announced by the Supreme Court in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-285 (1946), that "[the reemployed veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during [his military service]. (Citations omitted.)" *See Montgomery* v. *Southern Electrical Steel Co.*, 410 F.2d 611, 614 (5th Cir. 1969). The Supreme Court reaffirmed the "escalator principle" under the 1940 Act in *Oakley* v. *Louisville & N.R. Co.*, 338 U.S. 278 (1949), and expanded upon this principle in *McKinney* v. *Missouri-Kansas-Texas Railroad*, 357 U.S. 265, 271-72 (1958):

> The statute manifests no purpose to give to the veteran a status that he could not have attained as of right, within the system of his employment, even if he had not been inducted into the Armed Forces but continued in his civilian employment
>
> Thus on application for re-employment a veteran is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but on the exercise of discretion on the part of the employer.

A crucial issue in these cases is therefore whether "advancement depends essentially upon continuing employ-

ment" or whether "the exercise of management discretion [is] a prerequisite to promotion." *Tilton* v. *Missouri Pacific R.R.*, 376 U.S. 169, 179 (1964). In *Tilton*, the Court explained further what "automatic advancement" means:

> It would be virtually impossible for a veteran to show . . . that it was absolutely certain, "as a matter of foresight" when he entered the military service, that all circumstances essential to obtaining an advancement in status would later occur. To exact such certainty as a condition for insuring a veteran's seniority rights would render these statutorily protected rights without meaning. *Id.* at 180.

The Court specifically held that

> [a] returning veteran cannot claim a promotion that depends solely upon a satisfactory completion of a prerequisite period of employment training unless he first works that period. But upon satisfactorily completing that period, as petitioners did here, he can insist upon a senority date reflecting the delay caused by military service.

The resolution of these consolidated cases therefore turns upon whether the 1040 day of work experience is a training period to promote the Rule 154 carmen's skill and proficiency after which they receive actual promotions to carmen or simply an arbitrary period of time, after the completion of which Rule 154 carmen receive seniority and additional layoff protection and benefits. With this framework in mind, the Court turns to the facts of these cases.

III.

The parties have stipulated to the following facts:

A. That during the plaintiffs' completion of their 1040 day service periods, there existed no program

of formalized instruction or training on a group or individual basis; rather, the plaintiffs learned how to perform the tasks assigned by observing the performance of such tasks by more experienced carmen, and by receiving from such more experienced carmen additional instruction/assistance as was necessary;

B. That plaintiffs were not required to pass a proficiency test at any stage in their employment as Rule 154 carmen or before obtaining the journeyman status.

C. That upon achieving journeyman status Rule 154 carmen receive no increase in wages, because pursuant to Rule 154 they are paid the same wage as journeyman while performing carmen's work;

D. That upon completion of the 1040 day work requirement and attainment of journeyman status, a Rule 154 carman experiences no change in duties on the job;

E. That in the performance of tasks assigned, plaintiffs worked with journeyman carmen and other Rule 154 carmen alike;

F. That there are approximately eight (8) different job classifications within the craft or class of carmen; that a Rule 154 carman is not required to be proficient in or exposed to all types of work encompassed by these job classifications before obtaining journeyman status; that while Rule 154 does not so require, both the defendant railroad and defendant union uniformally encourage Rule 154 carmen to exercise their bidding opportunities so that they might become exposed to as many different types of work encompassed by these job classifications as possible and thereby increase their overall proficiency in the craft or class of carmen;

G. That these plaintiffs did each respectively possess upon and after the time that each was employed as Rule 154 carmen, the ability and skill to perform in a reasonably satisfactory manner the work to which each was assigned by defendant railroad's supervision, both prior and subsequent to their military service, and that such work to which they were assigned and in which they did engage as Rule 154 carmen was within the category or classification of work performed by journeyman carmen (mechanics) employed by defendant railroad at said location. That each of said plaintiffs received while employed and engaged as Rule 154 carmen the prevailing minimum mechanic's rate of pay as provided by the collective bargaining agreements referred to in this stipulation and the wage adjustments made from time to time;

H. At no time has an employee of defendant railroad been accorded permanent classification and seniority status as a journeyman carman unless and until he completes an apprenticeship or accumulated 1040 days (1160 days prior to September 1, 1949) of actual working experience at the work of carmen.

In *Spearmon* v. *Thompson*, 167 F.2d 626 (8th Cir. 1948), *cert. denied sub. nom. Delozier* v. *Thompson*, 335 U.S. 822 (1948), the Eighth Circuit recognized that if a collective bargaining agreement "required three years' service on the job" as a prerequisite to the attainment of the degree of proficiency which would entitle [him] to classification as a mechanic," plaintiff, a carman mechanic, would not have prevailed. 167 F.2d at 630. Defendant and intervenor therefore argue that, absent some showing that the 1040 day work period was established for some purpose other than the development of proficiency, plaintiffs are not entitled to relief. Relying upon the facts that since at least September, 1948, no person

has been regarded as a qualified carman until he has served an apprenticeship or has had four years' practical experience at carmen's work, and that days missed for any reason are not counted in the 1040 day computation, defendant and intervenor argue that the performance of 1040 days of carmen's work is a proficiency requirement.

In response, plaintiffs argue that "time on the job does not necessarily equal proficiency", *Spearmon* v. *Thompson*, *supra*, and that "there can be no serious contention that the requirement of actual service was designed to reward proficiency acquired through experience." *Borges* v. *Art Steel Co.*, 246 F.2d 735, 739 (2nd Cir. 1957). *See also Hatton* v. *Tabard Press Corp.*, 406 F.2d 593 (1969); *Moe* v. *Eastern Air Lines, Inc.*, 246 F.2d 215, 220 (5th Cir. 1957), *cert. denied*, 357 U.S. 936 (1958). Principal reliance is placed upon the recent case of *Adams* v. *General Motors Corp.*, 525 F.2d 161 (6th Cir. 1975), a case plaintiffs mistakenly assert as factually indistinguishable. The plaintiffs in *Adams* were selected to participate in an eight-year program leading to journeymen status and various trade classification. After four years in the program, an employee acquired additional protection from layoffs with an award in change of status. As in the case at bar, the change of status did not involve any change in duties or increases in wages.

Defendants in *Adams* relied upon *Foster* v. *Dravo Corp.*, 420 U.S. 92 (1975), which the Sixth Circuit found distinguishable.

> In *Foster* v. *Dravo Corp.*, the returned veteran was claiming full vacation benefits for the years he was in military service. There the collective bargaining agreement required that an employee receive earnings during 25 weeks of the previous year in order to qualify for vacation pay in any given year. The Court concluded that the 25-week provision con-

stituted a substantial work requirement and that the vacation benefits provided for by the contract "were intended as a form of short-term compensation for work performed." 420 U.S. at 100, 95 S.Ct. at 884. Finding that the veteran had failed to show "that vacations were intended to accrue automatically as a function of continued association with the company," the Court held that the bona fide work requirement of the contract had not been met. *Id.* at 101, 95 S.Ct. 879, 884. Under these circumstances Section 9 of the Act was not violated by the refusal of the employer to grant full vacation rights to the veteran for the years he spent in service.

The present case is clearly distinguishable from *Foster*. This court has held many times that vacation with pay constitutes additional wages for services already performed. *See International Association of Machinists, etc., Local 2369* v. *Oxco Brush Division*, 517 F.2d 239 (6th Cir. 1975); *Smith* v. *Kingsport Press, Inc.*, 366 F.2d 416 (6th Cir. 1966). The collective bargaining agreement in *Foster, supra*, clearly established the requirement that services be performed by employees in one year as a condition of entitlement to vacation benefits in the succeeding year. The use of the phrase "four years of work" in the agreement under consideration in the present case does not necessarily carry the same implication that actual services were required for an E.I.T. employee to gain the "S" classification. When this language is considered in light of the stipulated facts that virtually every employee who has entered the E.I.T. program and remained in it for four years has received the E.I.T.S. classification, that no wage increase or change in duties accompanied the new status, that no proficiency rating was required and no managerial discretion was involved, and that the only benefit of the status was additional security

against layoff we are led to the conclusion that actual performance on the job was not a condition for moving from E.I.T. to E.I.T.S. 525 F.2d at 165-166.

Unlike *Adams*, the "four years practical experience" in the agreement under consideration herein does require actual service. (Stip. Part IV, ¶ E). However, this Court also finds the present case distinguishable from *Foster* in that it cannot be argued that the seniority accorded carmen, like the vacation benefits provided for by the contract in *Foster*, "[was] intended as a form of short-term compensation for work performed." 420 U.S. at 100.

Although defendant and intervenor place great emphasis on the fact that 1040 days of actual work experience is required, the Court does not find this dispositive. The court in *Adams* concluded that

> [i]n the absence of evidence that movement to E.I.T.S. status was dependent on any achievement of proficiency or employer discretion, a returning veteran may not be denied the benefit of the "escalator" principle" because of a general benefit to the employer of keeping experienced workers. *Id.* at 166.

While the court's placement of burden of proof upon the defendant is questionable,[3] the test of "proficiency or employer discretion" is founded in sound logic and prior judicial precedent, and a careful evaluation of the facts under consideration leads the Court to the inescapable conclusion that the change in status from Rule 154 car-

[3] In *McKinney* v. *Missouri-Kansas-Texas Railroad Co.*, 375 U.S. 265, 273-74, the court recognized that the plaintiff had not had an opportunity to prove that by custom and practice plaintiff would have been automatically promoted had he remained in the employ of the company, and granted the plaintiff "leave to amend his complaint to allege, if such be the fact, that in actual practice under the collective bargaining agreement advancement from group 2 to group 1 is automatic."

men to Journeyman carmen is independent of any achievement of proficiency or employer discretion. Journeyman carmen status is not contingent upon any test measuring proficiency; the 1040 day period is free from any formalized instruction or training; Rule 154 carmen who achieve carmen status do not receive any increase in wages or change in duties; as a matter of custom and practice, attainment of journeyman status after 1040 days is virtually automatic; and in each case, had the time spent in the performance of work as Rule 154 carmen in defendant's railroad's employ without material interruption because of sickness, furlough or leave of absence, plaintiffs would not have been laid off on December 17, 1974. Although the intent of Congress is clear, the application of the law to the facts is not without substantial difficulty. Nevertheless,

> The legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. . . . And no practice of employers or agreements between employers and unions can cut down the service adjudged benefits which Congress has secured the veteran under the Act. *Fishgold* v. *Sullivan Corp.*, 328 U.S. at 285.

The seniority rights of veterans would be defeated if the courts allowed employers to make benefits contingent on work time rather than seniority without careful scrutiny of the facts to determine if the "work requirement constitutes a bona fide effort to compensate for work actually performed . . . ." *Foster* v. *Dravco Corp.*, 420 U.S. at 99. As the Eighth Circuit aptly stated in *Spearmon* v. *Thompson*, *supra*, "proficiency results from individual attainment without regard to the lapse of time; seniority advances with a calendar without necessary regard to the degree of proficiency." 167 F.2d at 631.

IV.

The parties have stipulated that

> [i]f, as plaintiffs herein contend, the Court finds that pursuant to the Vietnam Veteran's Military Readjustment Assistance Act of 1974, plaintiffs should have been accorded journeyman status upon their reemployment by defendant railroad upon return from military service, then the following amounts, together with interest at the prevailing rate, are owed each individual plaintiff from the date shown:
>
> Dennis Cohn—$5,036.00—
> December 18, 1974
>
> Daniel J. Mathers—$5,853.60—
> December 18, 1974
>
> Ralph E. Gosnell—$6,421.43—
> December 18, 1974
>
> Harry F. Miles—$2,693.48—
> December 18, 1974
>
> Thomas P. Meduna—$7,341.57—
> December 18, 1974

Accordingly, judgment shall be entered for plaintiffs in the above amounts and defendant shall be ordered to adjust plaintiffs' seniority dates.

Dated this 8th day of February, 1977.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

[Filed February 11, 1977]

Civil No. 75-0-249

RALPH E. GOSNELL,
Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,
Defendant,

and

SYSTEM FEDERATION No. 105,
RAILWAY EMPLOYEES' DEPT., AFL-CIO,
Intervenor.

ORDER

In accordance with the Memorandum filed contemporaneously herewith,

IT IS HEREBY ORDERED that judgment is entered for plaintiff in the amount of $6,421.43, together with interest at 8 per cent (8%) per annum from December 18, 1974, and costs.

IT IS FURTHER ORDERED that plaintiff be accorded his proper seniority status as journeyman carman, in accordance with the Court's Memorandum.

Dated this 8th day of February, 1977.

BY THE COURT

/s/ Robert V. Denney
ROBERT V. DENNEY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

[Filed February 11, 1977]

Civil No. 75-0-250

HARRY F. MILES,
Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,
Defendant,

and

SYSTEM FEDERATION No. 105,
RAILWAY EMPLOYEES' DEPT., AFL-CIO,
Intervenor.

ORDER

In accordance with the Memorandum filed contemporaneously herewith,

IT IS HEREBY ORDERED that judgment is entered for plaintiff in the amount of $2,693.48, together with interest at 8 per cent (8%) per annum from December 18, 1974, and costs.

IT IS FURTHER ORDERED that plaintiff be accorded a seniority date as journeyman carman, in accordance with the Court's Memorandum.

Dated this 8th day of February, 1977.

BY THE COURT

/s/ Robert V. Denney
ROBERT V. DENNEY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

[Filed February 11, 1977]

Civil No. 75-0-251

THOMAS P. MEDUNA,
Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,
Defendant,

and

SYSTEM FEDERATION NO. 105,
RAILWAY EMPLOYEES' DEPT., AFL-CIO,
Intervenor.

ORDER

In accordance with the Memorandum filed contemporaneously herewith,

IT IS HEREBY ORDERED that judgment is entered for plaintiff in the amount of $7,341.57, together with interest at 8 per cent (8%) per annum from December 18, 1974, and costs.

IT IS FURTHER ORDERED that plaintiff be accorded a seniority date as journeyman carman, in accordance with the Court's Memorandum.

Dated this 8th day of February, 1977.

BY THE COURT

/s/ Robert V. Denney
ROBERT V. DENNEY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

[Filed February 11, 1977]

Civil No. 75-0-248

DANIEL J. MATHERS,
Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,
Defendant,

and

SYSTEM FEDERATION NO. 105,
RAILWAY EMPLOYEES' DEPT., AFL-CIO,
Intervenor.

ORDER

In accordance with the Memorandum filed contemporaneously herewith,

IT IS HEREBY ORDERED that judgment is entered for plaintiff in the amount of $5,853.60, together with interest at 8 per cent (8%) per annum from December 18, 1974, and costs.

IT IS FURTHER ORDERED that plaintiff be accorded his proper seniority status as journeyman carman in accordance with the Court's Memorandum.

Dated this 8th day of February, 1977.

BY THE COURT

/s/ Robert V. Denney
ROBERT V. DENNEY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

[Filed February 11, 1977]

Civil No. 75-0-247

DENNIS COHN,
Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,
Defendant,

and

SYSTEM FEDERATION NO. 105,
RAILWAY EMPLOYEES' DEPT., AFL-CIO,
Intervenor.

ORDER

In accordance with the Memorandum filed contemporaneously herewith,

IT IS HEREBY ORDERED that judgment is entered for plaintiff in the amount of $5,036.00, together with interest at 8 per cent (8%) per annum from December 18, 1974, and costs.

IT IS FURTHER ORDERED that plaintiff be accorded his proper seniority status as journeyman carman, in accordance with the Court's Memorandum.

Dated this 8th day of February, 1977.

BY THE COURT

/s/ Robert V. Denney
ROBERT V. DENNEY
United States District Judge

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1977

[Filed March 27, 1978]

No. 77-1227

DENNIS COHN,
Appellee,

vs.

UNION PACIFIC RAILROAD COMPANY,

and

SYSTEM FEDERATION NO. 105,
RAILWAY EMPLOYEES' DEPARTMENT, AFL-CIO,
Appellant.

No. 77-1228

DANIEL J. MATHERS,
Appellee,

vs.

UNION PACIFIC RAILROAD COMPANY,

and

SYSTEM FEDERATION NO. 105,
RAILWAY EMPLOYEES' DEPARTMENT, AFL-CIO,
Appellant.

No. 77-1229

RALPH E. GOSNELL,
Appellee,

vs.

UNION PACIFIC RAILROAD COMPANY,

and

SYSTEM FEDERATION NO. 105,
RAILWAY EMPLOYEES' DEPARTMENT, AFL-CIO,
Appellant.

No. 77-1230

HARRY F. MILES,
Appellee,

vs.

UNION PACIFIC RAILROAD COMPANY,

and

SYSTEM FEDERATION NO. 105,
RAILWAY EMPLOYEES' DEPARTMENT, AFL-CIO,
Appellant.

No. 77-1231

THOMAS P. MEDUNA,
Appellee,

vs.

UNION PACIFIC RAILROAD COMPANY,

and

SYSTEM FEDERATION NO. 105,
RAILWAY EMPLOYEES' DEPARTMENT, AFL-CIO,
Appellant.

No. 77-1264

DENNIS COHN,
Appellee,

vs.

UNION PACIFIC RAILROAD COMPANY,
Appellant.

and

SYSTEM FEDERATION NO. 105,
RAILWAY EMPLOYEES' DEPARTMENT, AFL-CIO,
Intervenor

No. 77-1265

DANIEL J. MATHERS,
Appellee,

vs.

UNION PACIFIC RAILROAD COMPANY,
Appellant.

and

SYSTEM FEDERATION NO. 105,
RAILWAY EMPLOYEES' DEPARTMENT, AFL-CIO,
Intervenor

No. 77-1266

RALPH E. GOSNELL,
Appellee,

vs.

UNION PACIFIC RAILROAD COMPANY,
Appellant.

and

SYSTEM FEDERATION NO. 105,
RAILWAY EMPLOYEES' DEPARTMENT, AFL-CIO,
Intervenor

No. 77-1267

HARRY F. MILES,
Appellee,

vs.

UNION PACIFIC RAILROAD COMPANY,
Appellant.
and

SYSTEM FEDERATION NO. 105,
RAILWAY EMPLOYEES' DEPARTMENT, AFL-CIO,
Intervenor

No. 1268

THOMAS P. MEDUNA,
Appellee,

vs.

UNION PACIFIC RAILROAD COMPANY,
Appellant.
and

SYSTEM FEDERATION NO. 105,
RAILWAY EMPLOYEES' DEPARTMENT, AFL-CIO,
Intervenor

Appeals from the United States District Court
for the District of Nebraska

JUDGMENT

These causes came on to be heard on the record of the United States District Court for the District of Nebraska and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said

District Court in these causes be and the same is hereby affirmed.

Taxation of costs in Case Nos. 77-1227/1231/1264/1268: March 27, 1978

Costs taxed in favor of Appellees, Cohn and Meduna:

Costs of printing 10 copies of brief:	$5.00
Total costs of Appellees, Cohn and Meduna, for recovery in the U. S. District Court from Appellants, System Federation No. 105, Railway Employees' Department, AFL-CIO, and Union Pacific Railroad:	$5.00

A true copy:

Attest:

/s/ Robert C. Tucker
Clerk
U. S. Court of Appeals
8th Circuit

[SEAL]

FILED
AUG 25 1978
MICHAEL RODAK, JR., CLERK

No. 77-1828

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNION PACIFIC RAILROAD CO., ET AL., PETITIONERS

v.

DENNIS COHN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1828

UNION PACIFIC RAILROAD CO., ET AL., PETITIONERS

v.

DENNIS COHN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

---

1. Respondents brought this action against petitioner Union Pacific, their employer, in the United States District Court for the District of Nebraska, seeking an award of back pay and seniority credit under the Vietnam Era Veterans' Readjustment Act of 1974, 88 Stat. 1594, as amended, 38 U.S.C. (Supp. V) 2021 *et seq.*[1]

Respondents were employed as "Rule 154 carmen" with Union Pacific when they left to enter military service.[2] Under the applicable collective bargaining agreement, a Rule 154 carman attains journeyman status (with its journeyman's seniority date and added protection

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[1]Formerly the Military Selective Service Act of 1967, 62 Stat. 604, as amended, 50 U.S.C. (1970 ed.) App. 451 *et seq.*

[2]Respondents are represented by the Department of Justice pursuant to 38 U.S.C. (Supp. V) 2022.

against layoff) after accumulating 1040 days of experience at carman's work (Pet. App. 6a).

Upon being honorably discharged from military service, respondents were reinstated, see 38 U.S.C. (Supp. V) 2021(a), and resumed progress toward attainment of the 1040 days necessary to establish journeyman status. Prior to doing so, however, respondents were laid off because of lack of work (Pet. App. 7a). It was stipulated that if respondents had been continuously employed by Union Pacific during the time they spent in the military, they would have completed the 1040-day requirement and, as journeymen carmen, would not have been laid off (Pet. App. 7a-8a).[3]

Respondents argued in the district court that their layoffs violated 38 U.S.C (Supp. V) 2021(b)(2), which requires that a reinstated veteran be accorded the same seniority "as he would have enjoyed if [he] * * * had continued in [his] * * * employment continuously" rather than serving in the military. They contended that the 1040-day period was simply a period of time after which Rule 154 carmen were afforded additional layoff protection and benefits, and towards which a returning veteran should be automatically entitled to credit his time in the military service. See *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275. Petitioners contended that the 1040-day period is a period of substantive training, which respondents were required to satisfy as a prerequisite to "promotion" to journeymen. See *Tilton* v. *Missouri Pacific R. Co.*, 376 U.S. 169, 179.

[3]Petitioners' statement (Pet. 7) that the district court ordered reinstatement "without regard to the amount of working experience they had accumulated as Rule 154 carmen before entering the military" is incorrect. The district court took the total working experience of respondents into account in computing when they would have completed the 1040-day requirement, and it awarded back pay and seniority credit in the amount the parties stipulated as correct (Pet. App. 7a, 17a).

After "a careful evaluation of the facts under consideration," the district court reached "the inescapable conclusion that the change in status from Rule 154 carmen to Journeyman carmen is independent of any achievement of proficiency or employer discretion " (Pet. App. 15a-16a), and it entered judgment for respondents.

The court of appeals affirmed on the basis of the "well-reasoned opinion" of the district court, which the court of appeals found "supported by substantial evidence and * * * not induced by any erroneous view of the law" (Pet. App. 2a).[4]

2. Further review by this Court is unwarranted. The district court, on whose opinion we rely, properly held that the statute requires Union Pacific to give respondents seniority credit for the time they spent in military service. The result reached here is closely tied to the facts of this case, and there is no need for this Court to reexamine the factual inferences drawn by both lower courts.

In *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 284-285, this Court established the basic principle, now codified in 38 U.S.C. (Supp. V) 2021(b)(2), that the returning veteran "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously" instead of entering the military service. The Court refined this principle in *Tilton* v. *Missouri Pacific R. Co.*, *supra*, 376 U.S. at 179, explaining that, although a returning veteran cannot claim a "promotion" that depends on training unless he actually completes the training, he is entitled to credit his military service toward an advance in status

[4]The court of appeals added that the district court's judgment was further supported by *Alabama Power Co.* v. *Davis*, 431 U.S. 581, decided after the district court's decision (Pet. App. 2a).

which "depends essentially [on continued] * * * employment." The courts of appeals have consistently interpreted *Tilton* as requiring a veteran to complete a training period in order to claim a promotion only if the particular training period is designed to develop increased skill and proficiency. See, *e.g., Hatton* v. *Tabard Press Corp.*, 406 F. 2d 593, 597-598 (C.A. 2); *United States ex rel. Adams* v. *General Motors Corp.*, 525 F. 2d 161, 165-166 (C.A. 6); *Hanna* v. *American Motors Corp.*, 557 F. 2d 118, 121 (C.A. 7). The district court was thus entirely correct in stating that the resolution of this case "turns upon whether the 1040 day [period] of work experience is a training period to promote the Rule 154 carmen's skill and proficiency after which they receive actual promotions to carmen or simply an arbitrary period of time, after the completion of which Rule 154 carmen receive seniority and additional layoff protection and benefits" (Pet. App. 10a).

Here, as in *Tilton*, the veterans returned from military service to find that workers who had been junior to them on the Rule 154 list had become senior to them on the journeyman list. Compare Pet. App. 7a-8a with *Tilton, supra*, 376 U.S. at 177. And here, as in *Tilton*, advancement was dependent not on "the exercise of management discretion" but rather depended "essentially [on continued] * * * employment." Compare Pet. App. 15a-16a with 376 U.S. at 179. As the courts below found after a "careful evaluation of the facts under consideration," journeyman status "is independent of any achievement of proficiency or employer discretion" (Pet. App. 15a-16a). The case is thus like *United States ex rel. Adams* v. *General Motors Corp., supra*, 525 F. 2d at 164-165, where "[i]f the plaintiffs had remained continuously employed in the E.I.T. program

[similar to the Rule 154 program] rather than entering upon military duty they would have achieved E.I.T.S. status before the reduction in forces caused them to be dropped from the program and, obviously, before any of the non-veterans who entered E.I.T. after their date of entrance. The only change in status effected by moving from E.I.T. to E.I.T.S. was that the employee gained additional protection from layoff." Here, by the same token, respondents gained only "additional protection from layoff"; it was stipulated that the achievement of journeyman status resulted in no increase in wages and no change in duties (Pet. 10a-11a). In other words, completion of the 1040 days did not lead to a promotion of any sort; it simply led to placement on a higher seniority ladder. Since two lower courts have concurred in this factual finding, further scrutiny by this Court is unwarranted. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275; *United States* v. *Reliable Transfer Co., Inc.*, 421 U.S. 397, 401 n. 2.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
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